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No. 87-868

In the Supreme Court of the United States

OCTOBER TERM, 1987

ERNEST L. NELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial judge erred by permitting an expert witness to testify about certain characteristics of child sex abuse victims in response to a defense claim that the child victim's testimony was fabricated.

2. Whether the trial judge committed plain error by admitting the victim's out-of-court statements.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-6a) is reported at 25 M.J. 110. The decision of the Air Force Court of Military Review (Pet. App. 7a-11a) is reported at 21 M.J. 711.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 28, 1987. The petition for a writ of certiorari was filed on November 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Following a general court-martial at Tyndall Air Force Base in Florida, petitioner, a member of the United States Air Force, was convicted of committing indecent, lewd, and lascivious acts upon a female under 16 years of age, in

violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934. He was sentenced to confinement for two years, a bad conduct discharge, and ancillary punishments. The convening authority approved the sentence. The Air Force Court of Military Review affirmed the findings and sentence (Pet. App. 7a-11a). The Court of Military Appeals affirmed (*id.* at 1a-6a).

1. Veda Jane Lunsford, petitioner's six-year-old stepdaughter, was the victim in this case. In July 1984, while visiting her grandmother, Veda Jane complained of pain in her "private parts" (Tr. 176). Her grandmother took her to the emergency room at Blytheville Air Force Base in Arkansas, where she was examined by Dr. David Chastain, a pediatrician in that facility. During his treatment of Veda Jane, Dr. Chastain elicited from her that petitioner had tried to place his penis in her and that he had also performed oral sex on her (*ibid.*). Dr. Chastain then contacted Perry Jenkins, an investigator with the Arkansas Suspected Child Abuse and Neglect Agency. Jenkins interviewed Veda Jane on July 5, 1984, using anatomically correct dolls to assist in the interview. Veda Jane related that petitioner had touched her vagina with his finger (Tr. 285).

Julie Mittleman, an expert in the field of child school psychology, examined Veda Jane on September 5, 1984 (Tr. 53). Veda Jane told Julie Mittleman that petitioner had pulled her panties down, had rubbed his penis against her vagina, and had placed his face in her vaginal area (Tr. 184-186).

Veda Jane testified at trial that petitioner "did something wrong to her" (Tr. 140-141); that the event occurred in their home at Tyndall Air Force Base (Tr. 141); that petitioner had touched her vaginal area with his right index finger (Tr. 143-144, 157); and that petitioner had taken his and her pants off (Tr. 144, 146). Veda Jane also acknowledged that petitioner had gotten on top of her and

had placed his mouth on her vagina (Tr. 156-158). She testified that this scenario occurred on more than one occasion (Tr. 160). In the course of her testimony, she used anatomically correct dolls to demonstrate what petitioner had done to her. The defense declined to cross-examine Veda Jane (Tr. 122).

2. In addition to Veda Jane's testimony, the prosecution introduced a stipulation of the expected testimony of Dr. Chastain (Tr. 174-177) and live testimony from Julie Mittleman (Tr. 177-193). Both Dr. Chastain and Julie Mittleman related Veda Jane's statements to them regarding the sexual abuse. On cross-examination of Ms. Mittleman, defense counsel elicited that petitioner and his wife had told her that Veda Jane may have fantasized the events she reported after seeing a pornographic movie at a relative's house (Tr. 188). The prosecution then was allowed to call Dr. James Hord, a clinical psychologist, to testify about why a child might not quickly report an incident of child abuse, and whether it was likely that a child would watch a pornographic movie and then falsely accuse someone of child abuse. As to the former question, Dr. Hord said there were several reasons why a child might not report sexual abuse immediately, such as fear of the adult involved or confusion about whether the incident was supposed to be positive or not (Tr. 203). As to the latter question, Dr. Hord testified that such a scenario was possible, but that he had never seen it before (Tr. 204).

3. The Court of Military Appeals held that Dr. Chastain and Julie Mittleman had obtained information from Veda Jane for the purpose of developing a diagnosis and treatment plan for her (Pet. App. 4a). The court therefore held that Veda Jane's statements were admissible under Mil. R. Evid. 803(4) as statements made for the purpose of diagnosis and treatment (Pet. App. 4a). The court also concluded that Dr. Hord's testimony was helpful to the

factfinder and was admissible under Military Rule of Evidence 702 (Pet. App. 5a).

ARGUMENT

1. Petitioner contends (Pet 4-8) the trial court erred by allowing Dr. Hord to testify that children generally do not lie when they make allegations of sexual abuse. Stating the issue in that fashion, however, does not fairly characterize Dr. Hord's testimony, which was much narrower than that characterization suggests.

At a pretrial hearing, the prosecution informed the trial judge that it intended to call Dr. Hord as a witness in its case-in-chief in order to describe the general characteristics of the victims of child sexual abuse (Tr. 77). The trial judge stated that if Dr. Hord testified at all, he would not be permitted to express his opinion as to whether Veda Jane was truthful (Tr. 78). The prosecution reassured the court that Dr. Hord would testify only about the reactions of child abuse victims in general (*ibid.*). Nonetheless, the trial judge ruled that Dr. Hord would not be allowed to testify during the prosecution's case-in-chief unless the defense did something to "trigger" the admission of his testimony (Tr. 79, 80).

After the defense elicited from Julie Mittleman that petitioner and his wife had told her that Veda Jane may have seen some pornographic movies at the home of a relative (Tr. 188), the prosecutor sought to introduce Dr. Hord's testimony to rebut the suggestion that Veda Jane had made up the incident. The prosecutor noted that the defense's attack on Veda Jane's credibility was based on the time between the event and her report of it and the possibility that she may have seen a pornographic movie that gave her the idea for her story. The prosecutor explained that Dr. Hord's testimony could be enlightening on both of those points (Tr. 195, 197). The trial judge ruled

that Dr. Hord's testimony was not admissible to bolster Veda Jane's credibility, but that the government could present his testimony for the narrow purposes proposed by the government (Tr. 198). The prosecutor then called Dr. Hord and asked him two questions dealing with why a child might not quickly report sexual abuse, and whether a child might falsely claim sexual abuse after viewing a pornographic movie (Tr. 198-199, 203-204).

As the Court of Military Appeals explained (Pet. App. 5a), Dr. Hord did not testify about the truthfulness of children who are the victims of child abuse, or about Veda Jane's veracity in particular. Instead, his testimony was limited to his observations about particular characteristics he had observed in sexually abused children. Dr Hord had never personally interviewed Veda Jane (Tr. 196), and he did not offer any opinion about her credibility (Tr. 203-204). Contrary to petitioner's contention, Dr. Hord's answers to the prosecution's questions did not amount to an opinion that "all children are truthful" or "this child is telling the truth."[1]

The trial judge therefore did not err by permitting Dr. Hord to testify. Military Rule of Evidence 702, like its counterpart in the Federal Rules, permits a witness to give testimony in the form of an opinion if it will assist the trier of fact to understand the facts or to determine a fact in issue. *United States* v. *Gipson*, 24 M.J. 246, 251 (C.M.A. 1987). A trial judge has broad discretion in the admission or exclusion of expert evidence (see *Hamling* v. *United States*, 418 U.S. 87, 125 (1974)), and his decision will be sustained on appeal unless it is manifestly erroneous.

[1] For that reason, the decision below does not conflict with the cases cited by petitioner (Pet. 4 & n.1, 7 n.3), which involved expert or lay testimony stating an opinion that the victim was truthful.

Salem v. *United States Lines Co.*, 370 U.S. 31, 35 (1962); *United States* v. *Marabelles*, 724 F.2d 1374, 1381 (9th Cir. 1984).

Dr. Hord's responses to the hypothetical questions put to him were certainly helpful to the triers-of-fact, since his testimony involved matters about which most lay persons are likely to be unfamiliar. The Court of Military Appeals has held there is a sufficient body of knowledge regarding the typical behavior of child sex abuse victims to permit experts to testify about the victim's behavior patterns (*United States* v. *Snipes*, 18 M.J. 172, 179 (C.M.A. 1984); see *State* v. *Middleton*, 294 Or. 427, 433, 657 P.2d 1215, 1221 (1983) (expert testimony describing the reaction of the typical child victim of familial sex abuse is admissible)), and its ruling is consistent with the decisions of other courts that have considered similar questions.[2] The trial judge carefully limited Dr. Hord's testimony to the specific matters that had been raised by the defense. Absent an arbitrary or irrational application of that balancing test, the trial judge's decision should be upheld. See *United States* v. *Robinson*, 560 F.2d 507, 515 (2d Cir. 1977) (en banc), cert. denied, 435 U.S. 905 (1978).

2. Petitioner also contends that Veda Jane's out-of-court statements should not have been admitted. His claim is quite narrow. He does not contend that Veda Jane's statements to the pediatrician, Dr. Chastain, or the

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[2] Expert testimony concerning the characteristics of victims of various offenses is commonly admitted. For example, evidence regarding the "battered child syndrome" is admissible to show absence of mistake. *E.g.*, *United States* v. *White*, 23 M.J. 84 (C.M.A. 1986); *State* v. *Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978). Evidence relating to the "battered spouse syndrome" is admitted on the same basis. *E.g.*, *Ibn-Tamas* v. *United States*, 407 A.2d 626 (D.C. 1979); *Smith* v. *State*, 247 Ga. 612, 277 S.E.2d 678 (1981); *State* v. *Baker*, 120 N.H. 773, 424 A.2d 171 (1980).

psychologist, Julie Mittleman, were inadmissible as hearsay; rather, he appears to accept the conclusion of the Court of Military Appeals that those statements fell within the exception to the hearsay rule for statements made for the purpose of medical treatment or diagnosis (Pet. 9).[3] Moreover, petitioner does not suggest that the admission of those statements violated his right to confront the witnesses against him; he was given the opportunity to cross-examine Veda Jane, but he chose not to do so. Petitioner's sole claim is that Veda Jane's out-of-court statements were more prejudicial than probative and therefore should have been excluded under Mil. R. Evid. 403. That claim must be evaluated under a plain error standard, because petitioner did not object to Dr. Chastain's testimony or to Julie Mittleman's testimony on that ground at trial.

The Court of Military Appeals found no plain error in this case (Pet. App. 4a-5a), and that ruling was plainly

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[3] Rule 803(4), Mil. R. Evid, which was taken verbatim from the Federal Rules of Evidence, permits statements made for the purpose of medical diagnosis or treatment to be admitted at trial. The trial judge found that Veda Jane's statements were made to professionals who were treating her for sexual abuse (Tr. 71-73), and the Court of Military Appeals upheld the trial court's finding (Pet. App. 4a). The admission of such statements made to physicians and other specialists is well recognized in military and federal law. See *United States* v. *Welch*, 25 M.J. 23 (C.M.A. 1987) (statements made to clinical psychologist and psychotherapist); *United States* v. *Deland*, 22 M.J. 70 (C.M.A. 1986), cert. denied, No. 86-5019 (Oct. 6, 1986) (statements to psychiatrist); *United States* v. *Iron Shell*, 633 F.2d 77, 82-85 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981), and *United States* v. *Iron Thunder*, 714 F.2d 765, 772 (8th Cir. 1983) (statements of sexual assault victims to physicians); *United States* v. *Nick*, 604 F.2d 1199, 1201-1202 (9th Cir. 1979) (statement of three-year-old assault victim to a physician).

correct. The admission of Veda Jane's out-of-court statements could not have prejudiced petitioner, because those statements were not materially different from the statements she made in her testimony at trial. To the extent that petitioner's defense was that Veda Jane's accusations against him were the product of imagination, suggestion by others, or possible exposure to a pornographic film, that defense was not impaired by the admission of Veda Jane's out-of-court statements, since petitioner's contention was that the impetus for her accusations arose before she made her statements to Dr. Chastain and Julie Mittleman. The mere repetition of her accusation, through the testimony of those two witnesses, was not enough to give rise to a significant risk of prejudice, and it certainly did not constitute a miscarriage of justice of the kind necessary to justify a finding of plain error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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